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No. 97-475

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

— v.—

TSUI YUAN TSENG,

Respondent.

On Writ Of Certiorari to the United States Court Of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The International Air Transport Association (IATA) respectfully moves for leave to file the attached Brief as *amicus curiae* in this case. The consent of counsel for the petitioner was obtained. The consent of counsel for respondent was requested and refused. This Court previously granted IATA's motion for leave to file a Brief as

amicus curiae in Support of the Petition for Writ of Certiorari. 1998 U.S. LEXIS 3398 (May 18, 1998).

IATA's interest in this case derives from its efforts on behalf of its 256 member air carriers to preserve the Warsaw Convention[1] as the uniform determinant of international air carrier liability to passengers while voluntarily modernizing and liberalizing its application. Voluntary initiatives led by IATA are ongoing and strongly supported by the United States Department of Transportation and other governmental authorities.

The Court's decision on the issue presented will have a significant impact on these efforts. As set forth more fully in the Brief attached to this motion, it is of national and international importance that this Court's decision take cognizance of these developments.

Respectfully submitted,

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Dated: July 16, 1998

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C. § 40105 (1997) (note).

TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	2
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. ARTICLE 17 OF THE WARSAW CONVENTION PROVIDES THE EXCLUSIVE REMEDY FOR AIRLINE PASSENGERS INJURED IN "INTERNATIONAL TRANSPORTATION" AS DEFINED BY ARTICLE 1(2) OF THE CONVENTION	6
A. The Court Below Improperly Engaged In Judicial Activism In Attempting to Find a Set of "Ordinary Torts" Outside The Convention	6
1. The Second Circuit Failed To Follow This Court's Guidance In Interpreting The Convention	7
2. In Denying Article 17 Full Preemptive Effect, The Court Ignored The Necessary Consequences Of Federal Preemption Analysis As Determined In The Fifth Circuit's *Potter* Decision	10
B. The Second Circuit's Position Cannot Be Reconciled With The Shared Expectations Of The Parties To The Convention	12

II. THIS COURT SHOULD REAFFIRM THE UNITED STATES' COMMITMENT TO A UNIFORM, GLOBAL PASSENGER COMPENSATORY LIABILITY REGIME 14

A. The Air Carriers' Current Initiative To Modernize And Liberalize The Warsaw Convention's Worldwide Article 17 Passenger Compensatory Liability Regime Is Ongoing And Had Had The Strong Support Of The U.S. Department of Transportation 15

B. The Air Carriers' Efforts To Modernize The Warsaw Convention Passenger Liability Regime Worldwide Would Be Seriously Impaired If the Convention Is Not Read To Provide The Exclusive Remedy For Personal Injuries In "International Transportation" 18

CONCLUSION 22

TABLE OF AUTHORITIES

Cases ***Page***

Abnett v. British Airways plc, 1 All E.R. 193 (H.L. 1996) ..... *passim*

Air France v. Saks, 470 U.S. 392 (1985) ..... *passim*

Dooley v. Korean Air Lines Co., Ltd., 118 S. Ct. 1890 (1998) 13

Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991) ..... *passim*

Potter v. Delta Air Lines, Inc., 98 F.3d 881 (5th Cir. 1996) 5,10,11

Zicherman v. Korean Air Lines Co., Ltd., 516 U.S. 217 (1996) 7,14

STATUTES

49 U.S.C. § 41308 15

49 U.S.C. § 41309 15

Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C. § 40105 (1997) 2,14

MISCELLANEOUS

Council Regulation (EC), No. 2027/97 (Oct. 9, 1997) 3

International Air Transport Association: Agreement Relating to Liability Limitations of The Warsaw Convention, Order 96-10-7, 1996 WL 563872 (Dep't of Transp. Oct. 3, 1996) 17

International Air Transport Association: Agreement Relating to Liability Limitations of The Warsaw Convention, Order 97-1-2, 1997 WL 4834 (Dep't of Transp. Jan. 8, 1997) 18

Order on Discussion Authority Regarding Limits and Conditions of Passenger Liability Established by the Warsaw Convention, 60 Fed. Reg. 12813 (Dep't of Transp. 1995) 15,20

International Civil Aviation Organization Document C-WP/10688 4

International Civil Aviation Organization Document 9693-LC/190 4

Letter from Waxman, Solicitor General, to Suter, Clerk of the Supreme Court of the United States July 1, 1998 4

Report of the Meeting of the Special Group on the Modernization and Consolidation of the "Warsaw System" (SGMW), Montreal, April 14-18, 1998 4

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BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL AIR TRANSPORT ASSOCIATION IN SUPPORT OF PETITIONER

The International Air Transport Association ("IATA") respectfully submits this brief as *amicus curiae* in support of petitioner.[1]

[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation and submission of this brief.

INTEREST OF *AMICUS CURIAE*

IATA is an organization of some 256 air carriers, including virtually all of the international air carriers, the majority of which are either owned or controlled by sovereign nations.[2] Since its establishment in 1945 by Special Act of the Canadian Parliament, IATA has worked closely with governments and intergovernmental organizations to achieve and maintain uniformity in the interpretation of international agreements affecting civil aviation, including the Warsaw Convention.[3] IATA has also worked to assure that such agreements are responsive to inevitable changes in technology, economics and jurisprudence. These activities are consistent with IATA's overriding purpose of promoting safe, regular and economical air transportation for the benefit of all peoples of the world.

Many of IATA's member air carriers transport passengers, baggage and goods to and from the United States and, therefore, are subject to United States jurisdiction. IATA is currently playing a major role in promoting voluntary air carrier agreements that waive the Warsaw Convention's limitation of liability for international passenger air transportation and restrict use of certain defenses. These efforts have been approved by the U.S. Department of Transportation ("DOT") and many other government authorities around the world. The Second

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[2] A complete list of IATA's member air carriers is found in the Appendix to its October 10, 1997 Brief *Amicus Curiae* in Support of Petitioner at the *certiorari* stage.

[3] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C. § 40105 (1997) (note). The Articles cited herein are reproduced at Appendix A.

Circuit's decision in *Tseng v. EL AL Israel Airlines, Ltd.*, 122 F.3d 99 (2nd Cir. 1997), if sustained, could inhibit this global effort by denying IATA member air carriers serving the United States the benefit of the Convention's fundamental liability boundaries and uniform liability regime. It would thus make IATA's effort to encourage additional air carriers to adopt liberalized and modernized liability provisions substantially more difficult because carrier interest in voluntarily enhancing passenger rights under the Convention is tied to the corresponding benefit of preserving a properly bounded and uniform liability regime.

Accordingly, IATA has a direct and substantial interest in the case before the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case comes before the Court at an extraordinary time in the history of the Warsaw Convention liability regime. Since 1995, more than 100 air carriers, including the vast majority of the major international carriers, have agreed to waive all monetary limitations on compensatory damages permitted under the Convention and to absorb a substantial amount of strict liability in Convention cases. The voluntary agreements leading to these actions have been endorsed as a "gigantic step" forward by the DOT, used as a standard for European air carrier liability by the European Union[4] and applauded by governments throughout the world. They may indeed have broken the logjam which has heretofore precluded governments from comprehensively updating the

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[4] Council Regulation (EC) No. 2027/97 (Oct. 9, 1997), eff. Oct. 17, 1998 (extending regime of no limits and 100,000 Special Drawing Rights strict liability to both domestic and international operations of European air carriers).

Convention[5] and they have apparently persuaded the United States Senate to move forward ratification of Montreal Protocol No. 4 to the Convention, and thus reaffirm the Convention's occupation of the field of airline liability for passenger injury in international air transportation. *See* Letter from Waxman, Solicitor General, to Suter, Clerk of the Supreme Court of the United States, July 1, 1998 at 2.

The Second Circuit's decision in *Tseng* is both legally erroneous and threatening to this positive movement. If affirmed, it would create liability in the absence of both the accident -- *i.e.*, "an unexpected or unusual *event* or *happening* that is external to the passenger", *Air France v. Saks*, 470 U.S. 392, 405 (1985) (emphasis added) -- and the physical injury prerequisites to recovery under Article 17, *Eastern Airlines v. Floyd*, 499 U.S. 530, 535-36 (1991). This liability would be unbounded by Convention rules and administered under a variety of state laws. It would thus depart radically from a treaty regime which, as this Court previously has emphasized, is designed to promote certainty and uniformity in the law governing air carrier liability in international air transportation.

The consequences of such a departure would be extremely unfortunate. The preservation of insurable boundaries and

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[5] On November 26, 1997, the Council of the International Civil Aviation Organization ("ICAO") established a Special Group on the Modernization and Consolidation of the "Warsaw System," (SGMW). *See* ICAO Doc. C-WP/10688. This Special Group is considering a draft revised Convention prepared by the ICAO Legal Committee, ICAO Doc. 9693-LC/190, and is currently reviewing the comments of Member States on the draft text in contemplation of a Council decision on convening a Diplomatic Conference. *See* Report of the Meeting of the Special Group on the Modernization and Consolidation of the "Warsaw System" (SGMW), Montreal, April 14-18, 1998, (noting "a strong commitment towards the swift finalization of the new instrument" to "seize this historic opportunity").

uniform liability rules in international air transportation under the Convention has been the carrot which has induced many IATA members to voluntarily waive Article 22(1) limits in Article 17 cases. Similarly, the facilitation of settlement by uniform, predictable Convention rules has encouraged carriers to accept a substantial measure of strict liability as a further means of minimizing litigation costs. The decision below, by contrast, would leave carriers uncertain as to whether Convention rules would apply to any particular claim since plaintiffs' attorneys would certainly plead non-Convention claims as alternatives or supplements in virtually every case arising in international air transportation. Moreover, litigation costs undoubtedly would escalate as novel, non-Convention claims were adjudicated and settlement postponed.

The inevitable result would be a significant disincentive to expansion of participation in beneficial intercarrier agreements. In addition, the lure of litigating outside Convention boundaries could stir opposition to United States participation in continuing international negotiating efforts to enhance the position of passengers under the treaty regime while reaffirming its preemptive purpose and uniform liability rules.

IATA believes that the wording, purpose and negotiating history of the Warsaw Convention require reversal of the decision below. The preclusive effect of Article 17 limitations was recently affirmed by the House of Lords for exactly these reasons in *Abnett v. British Airways plc,* 1 All E.R. 193 (H.L. 1996) and IATA encourages the Court to give weight to this well-considered decision as well as the Fifth Circuit's analysis in *Potter v. Delta Airlines*, 93 F.3d 881 (5th Cir. 1996) which reached the same conclusion. Thus, both on legal and practical grounds, reversal of the decision below is essential.

ARGUMENT

I. ARTICLE 17 OF THE WARSAW CONVENTION PROVIDES THE EXCLUSIVE REMEDY FOR AIRLINE PASSENGERS INJURED IN "INTERNATIONAL TRANSPORTATION" AS DEFINED BY ARTICLE 1(2) OF THE CONVENTION.

Petitioner and the Solicitor General will address in detail the errors in the Second Circuit's reasoning and analysis which led it to deny preemptive effect to the Convention's liability regime. However, there are several points of special interest to the international airline community that IATA wishes to emphasize.

A. The Court Below Improperly Engaged In Judicial Activism In Attempting to Find a Set of "Ordinary Torts" Outside The Convention.

To reach its ultimate conclusion denying full preemptive effect to the Convention's liability regime, the Second Circuit chose to ignore this Court's admonitions on how the Convention is to be interpreted, and adopted a narrow approach based more on assertion than reason. It also cramped the preemptive effect of the treaty, which is the supreme law of the land, without engaging in any of the traditional federal preemption analysis required by this Court's precedents.

1. The Second Circuit Failed To Follow This Court's Guidance In Interpreting The Convention.

In *Saks*, *Floyd*, and *Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996), this Court set out clear guidelines to be applied when interpreting the Convention.

First, the French text should be consulted to guide the analysis "because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties . . . [and] because the Warsaw Convention was drafted in French by continental jurists." *Saks*, 470 U.S. at 399. The French version is also "the only authentic text" of the Convention. *Floyd*, 499 U.S. at 535.

Second, isolated comments of delegates reported in the minutes of the 1929 Warsaw Conference are not determinative of the meaning of Convention Articles because these "remark[s] [do] not have the authority of submissions by the drafting committee," and may be nothing more than generalizations that do not "focus[] specifically" on the interpretive issue under consideration. *Zicherman*, 516 U.S. at 227.

Third, with particular reference to the scope of air carrier liability and Article 17, interpretations that best "accord[] with the Warsaw Convention's stated purpose of achieving uniformity of rules governing claims arising from international air transportation" are preferred. *Floyd*, 499 U.S. at 552. In general, "treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Saks*, 470 U.S. at 396 (internal citation omitted).

The Second Circuit ignored each of these interpretive principles. First, it looked only at the English text of Article 24(2) in concluding that the Convention was exclusive only where presumptive liability arose under Article 17. *Tseng*, 122 F.3d at 104-105. The Solicitor General's Brief in Support of Petition for Writ of Certiorari establishes that the French text's "[d]ans les cas prévus à l'article 17" encompasses all claims "in the circumstances anticipated [or 'foreseen'] in Article 17" *i.e.*, where a passenger seeks relief for injuries sustained between embarkation and disembarkation. *See* Solicitor General's Brief in Support of Petition for Writ of Certiorari at 14-15. The term "les cas prévus" "serves as a shorthand for personal injury cases in general -- which Article 17 addresses (or 'anticipates') comprehensively -- and distinguishes that class of cases from cases involving damaged or lost luggage and delay, to which Article 24(1) refers with the parallel phrase 'les cas prévus aux articles 18 et 19'." *Id.* The Second Circuit's English-only analysis, by ignoring the more expansive meaning of the Convention's French text, fails to "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Saks*, 470 U.S. 399.

Second, to bolster its English language reading of Article 24(2), the Second Circuit relies on vague, non-specific remarks by individual delegates or delegations in the English translation of the minutes of the 1929 Warsaw Conference. *Tseng*, 122 F.3d at 105. However, the statements it cites do not specifically address the question at issue. Rather, the referenced remarks merely suggest that the delegates were aware that the Convention would not deal with all issues affecting international commercial aviation and that a number of undefined subjects which are not addressed by the Convention would, *per force*, be left to domestic laws of the various signatory nations for resolution. Lord Hope of

Craighead, speaking for the House of Lords in *Abnett*, looked at these same minutes and found nothing in them to support the argument against giving less than full preemptive effect to Article 17's liability boundaries:

> But these are mere straws in the wind which emerged during several days of detailed discussion to which many delegates contributed. I do not find a sufficiently clear and consistent expression of views here about the objects of the Convention on the point which is at issue in this case to enable me to say that the answer to the problem is to be found in the minutes. The most that can be said is that I have not found anything in these minutes or in the accompanying material which contradicts the impression which I have already formed on reading the convention.

Abnett, 1 All E.R. at 208.

Third, the Second Circuit ignores this Court's strong admonition that the Convention should be construed consistently with the "shared expectations of the contracting parties," including most specifically, the desire to achieve uniformity in the laws governing international transportation by air. *Saks*, 470 U.S. 399. Its newly-minted "ordinary" injury concept covering injuries within the international air transportation scope of Article 17 – which it then illustrates with the example of a malfunctioning escalator causing injury *outside* the scope of Articles 17 and 24(2) -- would result in passengers claiming injury from the same incident on the same flight being treated differently if, for example, one claimed physical injury and one claimed non-physical injury for which relief is barred under Article 17. *See Floyd*,

499 U.S. at 552. No principle of uniformity could survive this concept whose practical result would be to ensure a mix of covered, Convention law, and "ordinary", state-law, claims in virtually every injury case.

2. In Denying Article 17 Full Preemptive Effect, The Court Ignored The Necessary Consequences Of Federal Preemption Analysis As Determined In The Fifth Circuit's *Potter* Decision.

It is undisputed that respondent's alleged harm occurred during embarkation in international travel by air and thus "inside" the substantive scope of the Warsaw Convention as defined by Articles 1 and 17. Nevertheless, the Second Circuit declares that respondent's remedy lies "outside" the Convention because she could not meet Article 17's requirements for establishing presumptive liability. *Tseng*, 122 F.3d at 104-05. The decision thus circumvented all of the Convention's conditions and limitations which establish uniform procedural, jurisdictional and substantive law for passenger liability.

In reaching this result, the Second Circuit failed to apply this Court's precedents on federal preemption. It also summarily rejected the Fifth Circuit's decision in *Potter v. Delta Air Lines*, 98 F.3d 881 (5th Cir. 1996) giving Article 17 full federal preemptive effect. *Tseng*, 122 F.3d at 107. This telling omission strongly suggests that the court below could find no flaw in the *Potter* court's reasoning or in its application of this Court's prior federal preemption decisions.

The Fifth Circuit's reasoning in *Potter* is indeed compelling. First, it properly followed this Court's guidance in *Floyd* and *Saks* by interpreting the Convention "in order

to advance its [apparent] goals." *Potter*, 98 F.3d at 885. To ascertain these goals, it cited this Court's findings in *Zicherman*, concluding that "[a] primary function of the Warsaw Convention is to foster uniformity in the laws governing international air carrier liability." *Id.*

Second, applying this Court's federal preemption criteria, the Fifth Circuit inquired whether the "area" requiring uniformity, that is, international passenger liability, would be frustrated if state court actions could be brought within the jurisdictional scope of Article 17 whenever the claimant could not meet one or more of that Article's requirements for establishing liability. *Id.* The court then undertook a detailed analysis to show how state-law actions would nullify significant Convention conditions and limitations, that this Court's previous decisions on the scope of allowable Article 17 recoveries would be circumvented, and that plaintiffs could "plead artfully" around Article 17 in order to "forum-shop" in U.S. courts. *Id.* at 885-86.

Ignoring the Fifth Circuit's compelling analysis, the Second Circuit attempted to dismiss *Potter* by contending (i) that the Convention's goal of uniformity "has not always been found feasible in all areas of international travel," (ii) even where possible, uniformity cannot justify altering the operating structure of the Convention, citing *Zicherman*, and (iii) uniformity could be achieved equally as well by allowing recovery outside the Convention, "under a uniform body of law." *Tseng*, 122 F.3d at 107. The first point, even if true in the abstract, does not diminish the need to preserve uniformity where it is feasible. *See Abnett*, 1 All E.R. at 212. The second point is valid only if the court's misreading of Article 24 is assumed. As to the third point, the *Potter* court explained that there is no "uniform body of law" applicable to the state-law based cases that the Second Circuit would allow. *Potter*, 98 F.3d at 886. To the

contrary, there are widely varying procedural and substantive laws in the 50 states, all of which would potentially be applicable. This is the antithesis of the uniformity on passenger liability law and procedure sought to be achieved by the signatories to the Convention.

B. The Second Circuit's Position Cannot Be Reconciled With The Shared Expectations Of The Parties To The Convention.

This Court has stated that the "shared expectations of the contracting parties" must be taken into account when interpreting the Convention. *Saks*, 470 U.S. at 399. One such unchallengeable expectation is uniformity of the law applicable to passenger liability. *Floyd*, 499 U.S. at 532. The Second Circuit acknowledges this as a goal of the parties to the Convention, but nonetheless asserts that this objective would be "absurd" or "illogical" if it meant that claimants within the jurisdictional scope of Article 17, but unable to satisfy its requirements for carrier liability, could not step "outside" the Convention and ignore all its conditions and limitations. *Tseng*, 122 F.3d at 106-07.

There is, however, no illogic to the parties' contrary shared expectation. Rather, it would be illogical to render illusory the concept of uniformity by creating a parallel "opt-out" personal liability regime wholly reliant on the differing domestic laws of the various nations around the world. In its *Abnett* decision, the House of Lords made this point clearly when it observed that the signatories did not "set[] alongside the convention . . . an entirely different set of rules which would distort the operation of the whole scheme." *Abnett*, 1 All E.R. at 213.

Moreover, a treaty-based determination that air carriers should not be exposed to liability, under a presumptive fault

regime, for non-corporal passenger injuries associated with individual reactions to the experience of flight or the processes involved with the embarking or disembarking of such flights hardly seems "absurd". *Id.* at 207.

Consistent with this expectation of limitations on carrier responsibility for non-accidental or non-corporal injury, the Convention requires that all passengers be given notice of the applicability of the treaty with respect to the air carriers' liability for damages. The notice provides passengers the opportunity to obtain supplemental insurance or to take other precautions before embarking on an international journey. Article 23 also invalidates "[a]ny provision [in the contract of carriage] tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention . . . ." As the Solicitor General has pointed out, it would have made no sense and would have been extremely one-sided and odd to have restricted the air carriers' right to limit liability by contract if passengers were free to pursue liability claims "within" Article 17 jurisdiction but "outside" its express terms. *See* Solicitor General's Brief in Support of Petition for Writ of Certiorari at 18-19; *see also*, *Dooley v. Korean Air Lines Co., Ltd.*, 118 S.Ct. 1890 (1998) (where Congress has struck a balance denying recovery for certain claims and claimants under Death On The High Seas Act, applicable under Article 17, Court cannot substitute its own views).

The Second Circuit's opinion would, therefore, render the Convention's goal of uniformity and its conditions and limitations on passenger liability a nullity. This result cannot be accepted as reflecting the "shared expectations" of the Convention's signatories, including the Government of the United States.

II. THIS COURT SHOULD REAFFIRM THE UNITED STATES' COMMITMENT TO A UNIFORM, GLOBAL PASSENGER COMPENSATORY LIABILITY REGIME.

The Warsaw Convention is the most widely adhered to private international law treaty. Some 120 nations are parties to the agreement. The Convention is universally recognized as a unique, remarkable achievement because of its establishment of a uniform liability regime for international transportation by air which provides certainty and common legal expectations for air carriers, passengers, and shippers throughout the world. Since its proclamation by President Franklin Delano Roosevelt on October 29, 1934, the Convention has been the supreme law of the land. *See*, 49 Stat. 3000 *et seq.*; *cf.*, *Zicherman*, 516 U.S. at 226.

To preserve "uniformity in the law of international air travel," *Zicherman*, 516 U.S. at 330, against concerns that certain of the Convention's limits were unduly restrictive on passengers, IATA and the world's air carriers have, during the past several decades, undertaken certain voluntary initiatives to modernize and liberalize those rules. Thus, in 1966, the airlines entered into a multilateral agreement under which they voluntarily raised the Article 22(1) limit of liability for personal injury or death to $75,000 and waived the non-negligence defense in Article 20(1) for claims up to that amount, thus providing for virtual strict liability when such damages had been demonstrated. More recently, when it became apparent that governments were unable to succeed in modernizing the liability regime through treaty amendment, IATA and the world's leading air carriers once again liberalized the liability rules, this time waiving all Article 22(1) liability limits for passengers worldwide, and their Article 20(1) non-negligence defenses for U.S.-related

transportation up to 100,000 Special Drawing Rights, or approximately $135,000.

These voluntary waivers, however, have depended, and continue to depend, on the maintenance of a common, uniform understanding that Article 17 bounds the claims that can be brought. By reaffirming the need for global uniformity on the law of passenger liability and rejecting the Second Circuit's contrary position, this Court can further the airlines' initiative to globalize these waivers to the benefit of all international passengers.

A. The Air Carriers' Current Initiative To Modernize And Liberalize The Warsaw Convention's Worldwide Article 17 Passenger Compensatory Liability Regime Is Ongoing And Had Had The Strong Support Of The U.S. Department of Transportation.

To comprehend fully the impact of the Second Circuit's decision, it is necessary for this Court to understand in some detail the extensive efforts by IATA and the world's air carriers and the DOT in fashioning the most recent changes to the Warsaw passenger liability regime.

The process began on February 22, 1995 when the DOT granted IATA's application for so-called "discussion authority." *Order on Discussion Authority Regarding Limits and Conditions of Passenger Liab. Est. by the Warsaw Convention*, 60 Fed. Reg. 12813 (Dep't of Transp. 1995). This authority, under 49 U.S.C. §§ 41308 and 41309, granted antitrust immunity for the air carriers to discuss and reach agreements on changing or even eliminating the limitation of liability in Article 22(1) of the Convention and waiving one or more of the defenses found in Articles 20(1)

and 21. Pursuant to this "discussion authority," representatives of the world's air carriers held a series of meetings in Washington which were monitored by the DOT and the Department of Justice.

The first agreement to emanate from these sessions was the "IATA Intercarrier Agreement on Passenger Liability." This agreement, which came to be known as the "IIA," was unanimously endorsed at the IATA Annual General Meeting on October 31, 1995. It is an umbrella agreement pursuant to which the air carriers agree, *inter alia*, "[t]o take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention . . . ."[6] The IIA reserves all available Convention defenses, but provides that any air carrier may waive any defense, including the waiver of any defense up to a specified monetary amount of recoverable compensatory damages, as the circumstances may permit. Thus, by the fall of 1995, many of the world's air carriers had taken the first step toward waiving any limitation of liability to compensate for injuries cognizable under Article 17.

The next step was to reach agreement on measures to implement the IIA in air carrier tariffs and conditions of carriage. Further meetings of the air carriers were held pursuant to DOT discussion authority. IATA carriers evolved the "Agreement on Measures to Implement the IATA Intercarrier Agreement" ("MIA"), under which signatories agreed to tariff language waiving, *inter alia*, any limitation of liability under Article 22(1) for all recoverable compensatory damages arising under Article 17. Air carriers

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[6] The full text of the IIA is found at Appendix B.

also could use the MIA tariff language to waive Article 20(1) non-negligence defenses for portions of the claims that did not exceed 100,000 Special Drawing Rights, or the equivalent of approximately $135,000 at current exchange rates.[7] In other words, carriers, responding to the DOT, could agree to virtual strict liability up to the latter amount and waive any financial limitation on compensatory damages.

U.S. air carriers, many of which are also IATA members, developed a further agreement under the auspices of the Air Transport Association of America ("ATA"). This agreement, called the "ATA Provisions Implementing the IATA Intercarrier Agreement to be Included in Conditions of Carriage and Tariffs" ("IPA"), took the additional step of permitting, subject to applicable law, recoverable Article 17 compensatory damages to be determined by reference to the law of the domicile or permanent residence of the passenger.

The three air carrier agreements were submitted to the DOT on July 31, 1996 for approval and antitrust immunity under 49 U.S.C. §§ 41308 and 41309. On October 3, 1996, the DOT issued a Show Cause Order tentatively approving the agreements and recommending certain conditions. *International Air Transp. Assoc.: Agreement Relating to Liab. Limitations of The Warsaw Convention*, Order 96-10-7, 1996 WL 563872 (Dep't of Transp. Oct. 3, 1996). In its Order, the DOT specifically found that "[w]ith their provision for the worldwide waiver of the Warsaw passenger liability limits, the agreements have made a gigantic step toward creating an international liability regime under which carriers properly accept liability for death or injuries of passengers utilizing their service." *Id.*, 1996 WL 563872 at

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[7] The full text of the MIA is found at Appendix C.

*5. The agreements were given final DOT approval on January 8, 1997. *International Air Transp. Assoc.: Agreement Relating to Liab. Limitations of The Warsaw Convention*, Order 97-1-2, 1997 WL 4834 (Dep't of Transp. Jan. 8, 1997).

B. The Air Carriers' Efforts To Modernize The Warsaw Convention Passenger Liability Regime Worldwide Would Be Seriously Impaired If the Convention Is Not Read To Provide The Exclusive Remedy For Personal Injuries In "International Transportation."

The extraordinary effort spearheaded by IATA and the world's air carriers with the support of the U.S. DOT to modernize and liberalize terms of the Warsaw Convention is driven by the value air carriers place on global uniformity in passenger liability. IATA has undertaken a worldwide campaign, in cooperation with many member air carriers, to persuade all international air carriers to sign the IIA and the MIA. The agreements are currently being considered by air carriers throughout the world. As of July 9, 1998, the IIA had 107 signatories and the MIA had 67 signatories.[8]

Much work remains to be done to encourage true, global acceptance of the new, liberalized regime. Until this task has been completed, the full benefits -- the "gigantic step" to which the DOT referred -- will not be available to passengers on international flights throughout the world, including the millions of United States citizens who travel between foreign points having no contact with this country.

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[8] A list of the signatories is found at Appendix D.

For all such passengers, the Warsaw Convention -- hopefully as modified by the IATA air carriers' agreements -- will provide their best protection.

IATA, and its air carrier members, undertook this effort to modernize and liberalize the passenger liability provisions of the Convention in the expectation that Article 17 would be given the full preemptive effect that is reflected in the House of Lords' *Abnett* decision and in the Fifth Circuit's *Potter* decision. These decisions provide the certainty on the extent of liability risks that is the *quid pro quo* for the air carriers' willingness to waive liability limits under the Convention's presumptive fault regime and to take the additional step of waiving Article 20(1) defenses up to 100,000 Special Drawing Rights for United States-related traffic.

Throughout this modernization process, IATA and its air carriers have been reinforced in these beliefs by the DOT's recognition that a uniform, global passenger liability regime was in the best interest of all passengers, but most particularly, United States passengers. Thus, at the beginning of the process, in its Order granting "discussion authority" on February 22, 1995, the DOT recognized that the United States could not simply "order" foreign nations to accord U.S. citizens the relief which it may believe is most appropriate in the event of harm during international transportation as defined by Article 1(2) of the Convention. In discussing and rejecting alternatives to an air carrier voluntary effort to liberalize and modernize the Warsaw Convention, the DOT specifically observed:

> A final alternative would be for the United States to unilaterally establish a regime that all carriers operating to the United States would have to abide by. This approach, however, could engender such significant

> opposition from our trading partners that our ability to implement the plan unilaterally would very well be jeopardized.

60 Fed. Reg. at 12813.

The DOT went on to note that:

> IATA seeks discussions geared toward producing a temporary arrangement, recognizing the immediate need to increase the liability limits through a uniform system of rules. This is fully consistent with our objectives.

Id.

Lastly, the DOT commented:

> We have strived for a uniform international system that allows U.S. victims to receive fair recoveries within a reasonable period of time.

Id., at 12814.

The Second Circuit's decision denying preemptive effect to Article 17 places in jeopardy the *quid pro quo* on which the voluntary carrier agreements have been undertaken. It would be far more difficult, if not impossible, for IATA to persuade other air carriers to join these agreements if the U.S. commitment to a uniform liability regime is not apparent. It might prove equally difficult to go forward to an enhanced, uniform treaty regime if the state-law based actions permitted by the decision below were approved by this Court. Thus, the Second Circuit's decision, if affirmed, could greatly shorten the "gigantic step" that the DOT believed the IATA air carrier agreements would achieve for all passengers, and in particular, citizens of the United States. IATA therefore respectfully submits that this Court

should follow the recommendation of the Solicitor General[9] and reject the Second Circuit's erroneous interpretation of the Convention.

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[9] In his Brief in Support of Petition for Writ of Certiorari at 12, the Solicitor General notes that there are no issues presented here involving Article 25. That Article, in the case of "willful misconduct" precludes air carrier resort to "provisions of this convention which exclude or limit his liability." Any suggestion that allegations of "willful misconduct" based on Article 25 also permit claimants to avoid the requirements of Article 17, which deal with the establishment of liability rather than its exclusion or limitation, would find no support in the language, structure or purpose of the Convention.

CONCLUSION

The judgment of the Second Circuit Court of Appeal should be reversed.

Respectfully submitted,

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Attorneys for *Amicus Curiae*

Dated: July 16, 1998

APPENDIX A

Article 1(2)

(2) For the purpose of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

Article 3(1)(e)

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

. . .

(e) a statement that the transportation is subject to the rules relating to liability established by this convention.

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 20(1)

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

Article 22(1)

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [8300 Special Drawing Rights]. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract,

which shall remain subject to the provisions of this convention.

Articles 24(1) and 24(2)

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

1 b

APPENDIX B

IATA INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS, The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention[1] as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.

2. To reserve all available defences pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.

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1 "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air singed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

3. To reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.

4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.

5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.

6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.

7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).

8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this ____ day of _____ 199_

APPENDIX C

AGREEMENT ON MEASURES TO IMPLEMENT THE IATA INTERCARRIER AGREEMENT

I. Pursuant to the IATA Intercarrier Agreement of 31 October 1995, the undersigned carriers agree to implement said Agreement by incorporating in their conditions of carriage and tariffs, where necessary, the following:

1. {CARRIER} shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention.

2. {CARRIER} shall not avail itself of any defence under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs[1] [unless option II(2) is used].

3. Except as otherwise provided in paragraphs 1 and 2 hereof, {CARRIER} reserves all defences available under the Convention to any such claim. With respect to third parties, the carrier also reserves all rights of recourse against any other person, including without limitation, rights of contribution and indemnity.

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1 Defined if necessary.

II. At the option of the carrier, its conditions of carriage and tariffs also may include the following provisions:

1. {CARRIER} agrees that subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger.

2. {CARRIER} shall not avail itself of any defence under Article 20(1) of the Convention with respect to that portion of such claims which does not exceed 100,000 SDRs, except that such waiver is limited to the amounts shown below for the routes indicated, as may be authorised by governments concerned with the transportation involved.

[Amounts and routes to be inserted]

3. Neither the waiver of limits nor the waiver of defences shall be applicable in respect of claims made by public social insurance or similar bodies however asserted. Such claims shall be subject to the limit in Article 22(1) and to the defences under Article 20(1) of the Convention. The carrier will compensate the passenger or his dependents for recoverable compensatory damages in excess of payments received from any public social insurance or similar body.

III. Furthermore, at the option of a carrier, additional provisions may be included in its conditions of carriage and tariffs, provided they are not inconsistent with this Agreement and are in accordance with applicable law.

IV. Should any provision of this Agreement or a provision incorporated in a condition of carriage or tariff pursuant to this Agreement be determined to be invalid, illegal or unenforceable by a court of competent jurisdiction, all other provisions shall nevertheless remain valid, binding and effective.

V. 1. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become Party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).

2. Any carrier Party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers Parties to the Agreement.

3. The Director General of IATA shall declare this Agreement effective on November 1st, 1996 or such later date as all requisite Government approvals have been obtained for this Agreement and the IATA Intercarrier Agreement of 31 October, 1995.

Signed this ____ date of _____ 1996.

APPENDIX D

Signatories to IIA Agreement as of July 9, 1998

Aero Lingus plc
Aerolineas Argentinas S.A.
Aeromexpress
Aervias de México, S.A. de C.V. (Aeromexico)
Air Afrique
Air Aruba
Air Baltic Corporation SIA
Air Canada
Air Exel Commuter
Air France
Air Jamaica Limited
Air Mauritius
Air New Zealand
Air Pacific Limited
Air UK Group Limited
Air Vanuatu
Alaska Airlines
Alitalia
All Nippon Airways Co., Ltd.
Allegheny Airlines, Inc.
America West Airlines, Inc.
American Airlines
American Trans Air, Inc.
Asiana
Augsburg Airways GmbH
Austrian Airlines
Avianca
Azerbaijan Hava Yollary
Braathens S.A.F.E.
British Airways, plc

Canadian Airlines, International
Cathay Pacific Airways, Ltd.
Central Mountain Air Ltd.
Cimber Air A/S
Compagnie Air France Europe
Continental Airlines, Inc.
Continental Express
Continental Micronesia
Croatia Airlines
Crossair
CSA - Czech Airlines
Delta Air Lines, Inc.
Deutsche BA Luftfahrtgesellschaft mbH
Deutsche Lufthansa AG
Egyptair
Emirates
Estonian Air
Eurowings Luftverkehrs AG
Finnair OY
Garuda Indonesia
GB Airways
Hawaiian Airlines
Heli Air AG
Heli-Linth AG
Iberia
Icelandair
Interimpex-Avioimpex
Japan Air Charter (JAZ)
Japan Air System Co. Ltd.
Japan Airlines Co. Ltd.
Japan Asia Airways (JAA)
Jet Airways (India) Pvt Ltd.

Kenya Airways
Kiwi International Air Lines
KLM Cityhopper B.V.
KLM Royal Dutch Airlines
Korean Air Lines Co., Ltd.
LAPSA Lineas Aéreas Paraguayas
Lauda Air Luftfahrt AG
Luxair
Maersk Air A/S
Maersk Air Ltd.
Malaysia Airlines
Malev - Hungarian Airlines Public Ltd. Co.
Martinair Holland N.V.
Midwest Express Airlines, Inc.
Northwest Airlines
Pakistan International Airlines (PIA)
PGA Portugália Airlines
Piedmont Airlines, inc.
Polskie Linie Lotnicze - Polish Airlines
PSA Airlines, Inc.
Qantas Airways Limited
Reeve Aleutian Airways, Inc.
Regional Airlines
Royal Air Maroc
SABENA
Saudi Arabian Airlines Corp.
Scandinavian Airlines Systems (SAS)
Singapore Airlines Ltd.
Sobelair
South African Airways
Swissair
TACA

TAP Air Portugal
TAT European Airlines
Trans World Airlines Inc. (TWA)
Transavia airlines C.V.
Transbrasil S/A Linhas Aéreas
Trinidad & Tobago BWIA International
Türk Hava Yollari A.O. (Turkish Airlines Inc.)
Tyrolean Airways - Tiroler Luftfahrt -AG
United Airlines
UPS Airlines
USAir, Inc.
Varig S.A.
VIASA

Signatories to MIA Agreement as of July 9, 1998

Air Afrique
Air Baltic Corporation SIA
Air Canada
Air France
Air New Zealand
Air Pacific Limited
Alaska Airlines
Allegheny Airlines, Inc.
America West Airlines, Inc.
American Airlines
American Trans Air, Inc.
AMR Combs BJS, Inc.
AMR Eagle, Inc.
Asiana
Austrian Airlines
Avianca
British Airways, plc

Canadian Airlines, International
Cathay Pacific Airways, Ltd.
Central Mountain Air Ltd.
Compagnie Air France Europe
Continental Airlines, Inc.
Continental Express
Continental Micronesia
Crossair
CSA - Czech Airlines
Delta Air Lines, Inc.
Deutsche BA Luftfahrtgesellschaft mbH
Deutsche Lufthansa AG
Estonian Air
Finnair OY
GB Airways
Hawaiian Airlines
Heli Air AG
Heli-Linth AG
Icelandair
Kenya Airways
Kiwi International Air Lines
KLM Royal Dutch Airlines
Korean Air Lines Co., Ltd.
Lauda Air Luftfahrt AG
Luxair
Maersk Air A/S
Maersk Air Ltd.
Midwest Express Airlines, Inc.
Northwest Airlines
PGA Portugália Airlines
Piedmont Airlines, Inc.
PSA Airlines, Inc.

Qantas Airways Limited
Reeve Aleutian Airways, Inc.
Royal Air Maroc
SABENA
Scandinavian Airlines Systems (SAS)
Singapore Airlines Ltd.
Sobelair
Swissair
TAP Air Portugal
TAT European Airlines
Trans World Airlines Inc. (TWA)
Transavia Airlines C.V.
Transbrasil S/A Linhas Aéreas
Türk Hava Yollari A.O. (Turkish Airlines Inc.)
Tyrolean Airways - Tiroler Luftfahrt -AG
United Airlines
UPS Airlines
USAir, Inc.
Varig S.A.